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Matrix Avenue Sdn Bhd v Bumah bt Zainul Abidin & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO K-02–2678–11 OF 2012
MOHD HISHAMUDIN, ZAWAWI SALLEH AND UMI KALTHUM JJCA
1 APRIL 2014

Civil Procedure — Contempt of court — Committal proceeding — Judgment and order — Breach of stay order — Whether respondent's counsel's knowledge of stay order may be imputed to respondent — Failure to serve stay order fatal

The applicant/appellant had commenced a writ action against the respondents concerning a dispute over a land. The respondents counterclaimed for the recovery of the land. The High Court dismissed the applicant's claim, allowed the counterclaim and ordered that vacant possession of the land be given to the respondents ('the High Court order'). The Court of Appeal had stayed the execution of the High Court order pending the disposal of the applicant's appeal ('the stay order'). Through the present notice of motion, the applicant applied to commit the respondents to prison for allegedly being in contempt of the stay order by reason of allegedly refusing to obey the stay order. Learned counsel for the applicant conceded that the stay order was never served on the respondents. However, he argued that the stay order need not be served for the purpose of the contempt proceedings as learned counsel for the respondents was present in the Court of Appeal when the stay order was granted. It was contended that counsel's knowledge of the stay order was imputed to the respondents.

Held, dismissing the motion with costs:

(1) Although the stay order was issued on 4 April 2013, the motion was only filed on 1 July 2013. There was no explanation as to why the stay order was never served on the respondents since the day of its issuance, although there was ample time to serve the order (see paras 19–20).

(2) The stay order should have been served on the respondents before the contempt proceeding was commenced. The applicant's failure to serve the stay order on the respondents was fatal to the application (see para 21)

[Bahasa Malaysia summary

Pemohon/perayu telah memulakan tindakan writ terhadap responden-responden berkenaan pertikaian sebidang tanah. Responden-responden menuntut balas untuk mendapatkan kembali tanah tersebut. Mahkamah Tinggi menolak tuntutan pemohon, membenarkan

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tuntutan balas dan memerintahkan pemilikan kosong tanah tersebut diberikan kepada responden-responden ('perintah Mahkamah Tinggi'). Mahkamah Rayuan menangguhkan pelaksanaan perintah Mahkamah Tinggi sementara menunggu penyelesaian rayuan pemohon ('perintah penangguhan'). Melalui notis usul tersebut, pemohon memohon untuk memasukkan responden-responden ke dalam penjara atas dakwaan melakukan penghinaan terhadap perintah penangguhan dengan alasan enggan mematuhi perintah penangguhan. Peguam terpelajar bagi pihak pemohon mengakui bahawa perintah penangguhan tidak pernah disampaikan kepada responden-responden. Walau bagaimanapun, dia berhujah bahawa perintah penangguhan tidak perlu diserahkan bagi tujuan prosiding penghinaan mahkamah kerana peguam terpelajar bagi pihak responden-responden hadir di Mahkamah Rayuan apabila perintah penangguhan diberikan. Adalah dihujahkan bahawa pengetahuan peguam terhadap perintah penangguhan dikaitkan dengan responden-responden.

Diputuskan, menolak usul dengan kos:

(1) Walaupun perintah penangguhan dikeluarkan pada 4 April 2013, usul itu hanya difailkan pada 1 Julai 2013. Tiada penjelasan mengapa perintah penangguhan tidak disampaikan kepada responden-responden sejak hari ianya dikeluarkan, walaupun terdapat masa yang mencukupi untuk menyampaikan perintah (lihat perenggan 19–20).

(2) Perintah penangguhan sepatutnya disampaikan kepada responden-responden sebelum prosiding penghinaan mahkamah dimulakan. Kegagalan pemohon untuk menyampaikan perintah penangguhan terhadap responden-responden menjejaskan permohonan (lihat perenggan 21).]

Notes

For cases on committal proceedings, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 2124–2163.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Chin Chuen & Ors & Another Appeal [1995] 2 MLJ 770; [1995] 3 CLJ 639, CA (refd)

Capital Insurance Bhd v BS Sidhu [1996] 3 MLJ 1; [1996] 3 CLJ 477, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 13
Federal Constitution art 126
Rules of Court 2012 O 45 rr 5(1), 7, O 52 r 3(2)
Rules of the Court of Appeal 1994 r 4

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Appeal from: Civil Suit No 22–324 of 2010 (High Court, Alor Setar)

Tan Beng Hong (Khoo Chye Beng with him) (Khoo Chye Beng & Assoc) for the appellant.
Zakaria Md Saad (Zakaria & Co) for the respondent.

Mohd Hishamudin JCA (delivering judgment of the court):

[1] This notice of motion (encl 34a) is an application by the applicant/appellant (Matrix Avenue Sdn Bhd) to commit the first and fifth respondents, namely, Bumah bt Zainul Abidin and Salmah bt Bidin ('the respondents') to prison for (allegedly) being in contempt of an order of the Court of Appeal dated 4 April 2013.

[2] The applicant/appellant is not proceeding against the other named respondents.

[3] On 4 November 2013 we dismissed this motion with costs.

[4] This contempt proceedings against the respondents is commenced by the applicant by reason (allegedly) of the refusal on the part of the respondents to obey an order of the Court of Appeal dated 4 April 2013 ('the stay order').

[5] The stay order had stayed the execution of the order of the High Court of Alor Setar in the High Court of Alor Setar Civil Suit No 22–324 of 2010 pending the disposal of the applicant's Civil Appeal No K-02–2678–11 of 2012.

[6] Prior to the contempt proceedings, the applicant/appellant had commenced a writ action against the respondents and five others claiming to a right to possession over the disputed land (situated in the Island of Langkawi) pursuant to an alleged tenancy agreement.

[7] The respondents, with the five others, on their part, in that same writ action, filed a counterclaim against the applicant for the recovery of that land claiming that the land belonged to their late father and alleging that the tenancy agreement in question is invalid as, firstly, it is a Malay reserved land and, secondly, it was signed by only two of the seven respondents.

[8] The High Court dismissed the applicant's claim.

[9] Instead, the High Court allowed the counterclaim of the respondents and the five others.

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[10] The order of the High Court of Alor Setar, among others, made an order that vacant possession be given to the respondents. The order states:

DALAM MAHKAMAH TINGGI ALOR SETAR
DALAM NEGERI KEDAH DARUL AMAN
GUAMAN SIVIL NO. 22-324-2010
(Dahulunya Mahkamah Tinggi Pulau Pinang G/S 22-803-09)
ANTARA
MATRIX AVENUE SDN BHD ... PLAINTIF
(No. Syarikat 743546-P)
DAN
1. BUMAH BINTI ZAINUL ABIDIN
2. CHE AMAT BIN ZAINUL ABIDIN
3. RASALAN BIN ZAINOON ABIDIN
4. RASELI BIN ZAINUL ABIDIN
5. SALMAH BINTI BIDIN
6. SHARIPAH BINTI ZAINUL ABIDIN
7. ZAITON BINTI MOHAMAD LAZIM
8. ZAKARIA BIN MD SAAD ... DEFENDAN

(Dibatalkan sebagai Defendan menurut perintah Mahkamah bertarikh 20-09-11)

DIHADAPAN PESURUHJAYA KEHAKIMAN
ZAKIAH BINTI KASSIM

PADA 22 OKTOBER 2012 DALAM MAHKAMAH TERBUKA
PENGHAKIMAN

TINDAKAN INI dipanggil untuk perbicaraan pada 06-08-2012 dan 11-09-2012 dengan kehadiran Encik Khoo Chye Beng bersama-sama dengan Encik Elson Beh peguam Plaintif dan Encik Zakaria bin Md Saad bersama-sama dengan Encik H.A.Chuah peguam Defendan-Defendan DAN SETELAH MENDENGAR saksi-saksi kesemua pihak dan membaca eksibit-eksibit yang dikemukakan.

DAN TINDAKAN INI dipanggil untuk keputusan pada 22-10-2012 dengan kehadiran Encik Khoo Chye Beng peguam Plaintif dan Encik Zakaria bin Md Saad peguam Defendan-Defendan DAN SETELAH MEMBACA penghujahan-penghujahan bertulis kedua-dua pihak MAKA ADALAH HARI INI DIHAKIMI seperti berikut:-

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(i) Tuntutan Plaintif di tolak dengan kos,

(ii) Tuntutan Balas Defendan-Defendan dibenarkan dengan kos, iaitu

(a) Satu deklarasi bahawa tempoh penyewaan oleh Plaintif, atau mana-mana pihak yang lain, termasuk penyewaan oleh Wolfgang Ernst Sauer, dalam hartanah Defendan Ke-1 hingga Ke-7, terkandung dalam hakmilik H.S.(M) 24-96 Lot P.T. 712 Mukim Kedawang (sekarang Bandar Padang Mat Sirat), Daerah Langkawi, Kedah, tamat tempohnya pada 31-12-2009.

(b) Plaintif hendaklah serah kepada Defendan-Defendan milik kosong hartanah terkandung dalam hakmilik H.S.(M) 24-96 Lot P.T. 712 Mukim Kedawang (sekarang Bandar Padang Mat Sirat), Daerah Langkawi, Kedah, termasuk segala barangan merupa 'fixtures' kepada hartanah tersebut, berserta barangan lain yang dirujuk dalam perjanjian sewa yang dimasuki pada 31-10-1989 dan 11-04-2007, dalam keadaan elok dan sempurna, kepada Defendan Ke-1 hingga Ke-7.

(c) Plaintif hendaklah membayar kepada Defendan-Defendan gantirugi khas dalam bentuk gandaan sewa RM9,000.00 sebulan dari 01-01-2010 hingga tarikh penyerahan milik kosong hartanah tersebut.

(d) Plaintif hendaklah membayar kepada peguam Defendan-Defendan kos tindakan ini sebanyak RM20,000.00.

Bertarikh pada 22 Haribulan Oktober 2012

t.t.
NOORHIDAYAH BINTI MOHD SAAD
PENOLONG KANAN PENDAFTAR
MAHKAMAH TINGGI ALOR SETAR
KEDAH DARUL AMAN

[11] The stay order of the Court of Appeal states:

PADA 4 APRIL 2013 DALAM MAHKAMAH TERBUKA

PERINTAH

USUL INI ditetapkan untuk pendengaran pada hari ini dalam kehadiran Sunny Khoo (Khoo Chye Beng bersamanya), peguam bagi pihak Pemohon/Perayu dan Zakaria bin Md Saad, Peguam bagi pihak Responden/Defendan DAN SETELAH MEMBACA Notis Usul Kandungan (11a) dan Afidavit Sokongan oleh Ahmad Rizal bin Sulaiman diikrarkan pada 15 Mac 2013 yang difailkan di sini DAN SETELAH MENDENGAR hujahan pihak-pihak yang hadir MAKA ADALAH DENGAN INI DIPERINTAHKAN bahawa:

(a) Permohonan kandungan (11a) dibenarkan seperti berikut:

1. bahawa segala perlaksanaan penghakiman yang diberikan oleh

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Mahkamah [Tinggi Alor Setar] pada 22/10/2012 digantungkan sehingga pelupusan rayuan Plaintif terhadap penghakiman bertarikh 22/10/2012 tersebut di Mahkamah Rayuan;

2. bahawa suatu perintah untuk melarang dan/atau menghentikan Defendan-Defendan atau ejen, pekerja, orang suruhannya atau sesiapa daripada memasuki dan/atau mencerobohi dan/atau daripada mengambil possessi hartanah yang dahulunya dikenali sebagai GM 172, Lot 1225, Mk Kedawang, Langkawi, Kedah. (sekarang dikenali sebagai H.S.(M) 24-96, Lot P.T. 712, Mukim Kedawang (kini Bandar Padang Mat Sirat), Daerah Langkawi, Kedah dengan apa cara jua pun di mana Plaintif menjalankan bisnes resort dan restoran yang dikenali sebagai Beach Garden Resort atau nama sedemikian sehingga pelupusan rayuan Plaintif terhadap Penghakiman bertarikh 22/10/2012 di Mahkamah Rayuan;

3. bahawa suatu perintah untuk menahan Defendan-Defendan Pertama sehingga Defendan Ketujuh daripada apa cara jua pun daripada mengganggu resort dan restoran atau bisnis plaintif yang dikenali sebagai Beach Garden Resort dan/atau nama sedemikian yang didirikan atas hartanah-hartanah milikan Defendan-Defendan Pertama sehingga Defendan Ketujuh di Langkawi, Kedah sehingga pelupusan rayuan Plaintif terhadap Penghakiman bertarikh 22/10/2012 di Mahkamah Rayuan; dan

(b) Kos sebanyak RM5,000.00 dibayar oleh Responden-Responden kepada Perayu.

[12] The statement filed by the applicant pursuant to O 52 r 3(2) of the Rules of Court 2012 alleges:

PENYATAAN MENURUT ATURAN 52 KAEDAH 3(2)
KAEDAH-KAEDAH MAHKAMAH 2012

1. Pemohon di dalam ini adalah Matrix Avenue Sdn Bhd yang beralamat di No. Suite 18-01, 18th Floor, MWE Plaza, No. 8, Lebuh Farquhar, 10200 Pulau Pinang.

2. Nama orang-orang yang hendak dikomitkan ke penjara adalah:

(i) Bumah binti Zainul Abidin

(ii) Che Amat bin Zainul Abidin

(iii) Rasalan bin Zainoon Abidin

(iv) Raseli bin Zainal Abidin

(v) Salmah binti Bidin

(vi) Sharipah binti Zainul Abidin

(vii) Zaiton binti Mohamad Lazim

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3. Relif yang diminta di dalam ini adalah suatu perintah bahawa Responden pertama sehingga Responden ketujuh yang dinamakan di atas iaitu Bumah binti Zainul Abidin, Che Amat bin Zainul Abidin, Rasalan bin Zainoon Abidin, Raseli bin Zainal Abidin, Salmah binti Bidin, Sharipah binti Zainul Abidin dan Zaiton binti Mohamad Lazim hendaklah dikomitkan ke penjara Sungai Buloh bagi penghinaan mereka terhadap Mahkamah Yang Mulia ini dalam keengganan mereka untuk mematuhi Perintah Mahkamah Yang Mulia ini bertarikh 4/04/2013 yang menggantungkan pelaksanaan penghakiman Mahkamah Tinggi Malaya di Alor Setar di dalam Guaman Sivil No: 22-324-2010 sehingga pelupusan rayuan Pemohon di dalam Rayuan Sivil No: K-02-2678-11/2012 dan bahawa penghina-penghina hendaklah membayar segala kos yang disebabkan oleh prosiding ini.

4. Alasan-alasan yang diminta terhadap pengkomitan mereka adalah bahawa mereka enggan mematuhi Perintah Mahkamah Rayuan yang bertarikh 4/04/2013 dengan enggan berbuat/melakukan seperti berikut:

(i) Mengosongkan kesemua hartanah yang dikenali sebagai GM 172, Lot 1225, Mk Kedawang, Langkawi, Kedah. (sekarang dikenali sebagai H.S.(M) 24-26, Lot P.T. 712, Mukim Kedawang (kini Bandar Padang Mat Sirat), Daerah Langkawi, Kedah setelah menyalahi undang-undang dengan memasuki hartanah tersebut pada 4/04/2013 dan untuk berhenti daripada menghalang Pemohon menjalankan perniagaan resort mereka dan restoran yang dikenali sebagai Beach Garden Resort sehingga pelupusan rayuan mereka di dalam Rayuan Sivil No: K-02-2678-11/2012.

(ii) Mematuhi permintaan Penolong Kanan Pendaftar (Puan Noorhidayah binti Mohd Saad) untuk secara aman mengosongkan hartanah tersebut pada 25/04/2013 apabila beliau pergi ke Beach Garden Resort Pemohon, diiringi oleh Bailif Mahkamah (Encik Azizul Fattah bin Ishak).

[13] Article 126 of the Federal Constitution and s 13 of the Courts of Judicature Act 1964 confer on the Court of Appeal the power to punish any contempt of itself.

[14] But the Rules of the Court of Appeal 1994 do not provide for any rules on contempt proceedings. It merely provides by its r 4:

Application of Rules of Court 2012.

4 Where no other provision is made by any written law or by these Rules, the procedure and practice in the Rules of Court 2012 shall *mutatis mutandis* apply.

[15] Now, O 45 r 5(1) of the Rules of Court 2012 provides:

Enforcement of judgment to do or abstain from doing an act (O. 45, r.5)

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5(1) Where:

(a) a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time or, as the case may be, within that time as extended or abridged under Order 3, rule 5; or

(b) a person disobeys a judgment or order requiring him to abstain from doing an act, then, subject to these Rules, the judgment or order may be enforced by one or more of the following means:

(A) with the leave of the Court, an order of committal;

(B) where that person is a body corporate, with the leave of the Court, an order of committal against any director or other officer of the body;

(C) subject to the provisions of the Debtors Act 1957, an order of committal against that person or, where that person is a body corporate, against any such officer.

[16] And O 45 r 7 states:

7(1) In this rule references to an order shall be construed as including references to a judgment.

(2) Subject to order 26, rule 7(3), and paragraphs (6) and (7) of this rule, an order shall not be enforced under r. 5 unless —

(a) a copy of the order has been served personally on the person required to do or abstain from doing the act in question; and

(b) in the case of an order requiring a person to do an act, the copy has been so served before the expiration of the time within which he was required to do the act.

[17] Reverting to the notice of motion, it is not stated in the statement above as to whether the stay order issued by the Court of Appeal was served on the two respondents. Mr Khoo Chye Beng, learned counsel for the applicant conceded that the stay order was never served on the respondents. However, he argued that the stay order need not be served for the purpose of the contempt proceedings as learned counsel for the respondents, Encik Zakaria Saad, was present in court (the Court of Appeal) when the stay order was granted (a fact not disputed by the respondents). It is contended that counsel's knowledge of the stay order is imputed to the knowledge of his clients, the respondents. He cited the Court of Appeal's case of *Aik Ming (M) Sdn Bhd & Ors v Chang Chin Chuen & Ors & Another Appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639 where at p 821 (MLJ); p 680 (CLJ), Gopal Sri Ram JCA (as he then was) ruled:

> The second proposition which I accept as well settled is that the knowledge of a solicitor is regarded by the law as the knowledge of the client.

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[18] It is to be noted that whilst the stay order was issued by the Court of Appeal on 4 April 2013, sitting at the Palace of Justice, Putrajaya, the alleged act of contempt was alleged to have taken place in Langkawi on the very same day itself.

[19] It is also to be noted that although the stay order was issued on 4 April 2013, this motion was only filed on 1 July 2013.

[20] There is no explanation as to why the stay order was never served on the respondents since the day of its issuance, although there was ample time to serve the order.

[21] Our reason for dismissing the motion is that the stay order should have been served on the respondents before this contempt proceeding was commenced. The applicant had failed to serve the stay order on the respondents. In our view, such a failure is fatal to the application. It was so ruled in *Capital Insurance Bhd v BS Sidhu* [1996] 3 MLJ 1; [1996] 3 CLJ 477. In this case, Abu Mansor Ali JCA (as he then was) in delivering the judgment of the Court of Appeal said (at p 5 (MLJ); pp 480–481 (CLJ)):

> It was common ground that the said order was not served during the period the respondent was alleged to have disobeyed. Encik Yusuf Khan contended that it was not that the respondent had disobeyed the order but the truth was that the order was not served on him. Was it necessary to have the order served in spite of the fact that the respondent was present in court and heard the court pronounce the order? The respondent's counsel referred us to O 45 r 5(1) and r 7:
>
> > 5(1) Where
> >
> > (a) a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time or, as the case may be, within that time as extended or abridged under O 3, r 5; or
> >
> > (b) a person disobeys a judgment or order requiring him to abstain from doing an act,
> >
> > then, subject to the provisions of these rules, the judgment or order may be enforced by one or more of the following means, that is to say
> >
> > (i) with the leave of the Court, an order of committal;
> >
> > (ii) where that person is a body corporate, with the leave of the Court, an order of committal against any director or other officer of the body;
> >
> > (iii) subject to the provisions of the Debtors Act, 1957, an order of committal against that person or, where that person is a body corporate, against any such officer.

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(2) Where a judgment or order requires a person to do an act within a time therein specified and an order is subsequently made under r. 6 requiring the act to be done within some other time, references in para. (1) of this rule to a judgment or order shall be construed as references to the order made under r. 6.

[22] And then the relevant O 45 r 7 reads:

7(1) In this rule references to an order shall be construed as including references to a judgment.

(2) Subject to O. 24, r. 16(3), O. 26, r. 7 (3), and paras (6) and (7) of this rule, an order shall not be enforced under r. 5 unless

(a) a copy of the order has been served personally on the person required to do or abstain from doing the act in question; and

(b) in the case of an order requiring a person to do an act, the copy has been so served before the expiration of the time within which he was required to do the act.

We were unanimous in our view that although the respondent was present and heard the order directing him to refund the money deposited, nonetheless the respondent is required by the Rules of the High Court 1980 to be served with the order personally before he could be said to have wilfully disobeyed the order.

[23] The case of *Aik Ming* does not assist the applicant as the ruling there was not made in the context of a contempt proceeding.

Motion dismissed with costs.

Reported by Kanesh Sundrum